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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE APPLICATION OF SOLARCITY FOR A DETERMINATION THAT WHEN IT PROVIDES SOLAR SERVICE TO ARIZONA SCHOOLS, GOVERNMENTS, AND NON-PROFIT ENTITIES IT IS NOT ACTING AS A PUBLIC SERVICE CORPORATION PURSUANT TO ART. 15, SECTION 2 OF THE ARIZONA CONSTITUION.	DOCKET NO. E-20690A-09-0346 **COMMENTS ON PROPOSED AMENDMENTS TO RECOMMENDED OPINION AND ORDER**

Tucson Electric Power Company ("TEP") and UNS Electric, Inc., ("UNSE"), collectively referred to as "the Companies", through undersigned counsel, hereby submit their comments on (i) Commissioner Pierce's proposed amendment to the Recommended Opinion and Order ("ROO") filed in this docket ("Pierce Amendment"); and (ii) Commissioner Mayes' proposed amendment to the ROO ("Mayes Amendment").[1]

These comments are submitted in advance of the Open Meeting when the Commissioners are scheduled to vote on the ROO, in order to provide all interested parties additional time to consider the impact and consequences of the amendments. In support hereof, the Companies respectfully state as follows:

I. INTRODUCTION.

The proposed amendments actually raise two questions.

The first, "Is SolarCity an Arizona public service corporation?" is strictly a legal one, which is governed by the State Constitution and applicable legal interpretation. In answer to this

[1] The Companies reserve their right to submit to the docket comments on any other amendment to the ROO that may be offered.

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question, the Companies believe that the ROO should be adopted as proposed. The ROO accurately states the facts, identifies and addresses the relevant issues, soundly applies the appropriate legal principles and reaches findings and conclusions that are fully supported by the facts and law. SolarCity is an Arizona public service corporation.

The second question, "To what extent is SolarCity's provision of solar energy to Arizona schools, governments and non-profit agencies through SolarCity's specific solar services agreement ("SSA") subject to regulation by the Arizona Corporation Commission?" is one of public interest. It is the way the Amendments seek to resolve this question that is problematic. Both amendments err by declaring that SolarCity is not a public service corporation and thereby forfeiting any right to exercise any regulatory authority over the company.

In other words, the Companies believe that SolarCity is a public service corporation and the Commission can not disclaim jurisdiction over the company. However, to what extent, if any, the Commission determines it is in the best public interest to regulate SolarCity's provision of solar energy to Arizona schools, governments and non-profit agencies can be the subject of appropriate amendments to the ROO.

If the Commission were to determine that SolarCity is not a public service corporation, then it would forego authority over the company on such issues as : 1. providing any regulatory oversight of a company that receives millions of dollars of ratepayer-funded subsidies to provide renewable electricity directly to end user customers; 2. ensuring that the terms of providing services under SSAs or solar "leases"[2] are appropriate; 3. assisting consumers who believe that SolarCity is not charging them properly for the renewable electricity that it is providing; and 4.

[2] Contrary to the language in the proposed amendments, not all parties agree that SolarCity's solar lease clearly is not subject to regulation by the ACC. As set forth in the Companies' Initial Post-Hearing Brief (at pages 3-4), the record shows that the "solar lease" is identical to the SSA except for the payment structure. Under SolarCity's solar lease, SolarCity retains ownership and full operational control over the facilities. In fact, the solar lease is more troublesome than the SSA because the risk of efficient operation is placed on the consumer. The consumer still pays a set amount even if the facilities are not producing electricity and even though the consumer has no control over the operations of the facilities.

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ensuring that SolarCity will in fact follow through on its 20 year commitment to own, operate and maintain its solar facilities on the customer's premises.

The Companies believe that the Commission can achieve the objectives of the amendments while at the same time preserve its Constitutionally-mandated regulatory authority by:

1. Adopting the ROO and declaring SolarCity to be an Arizona public service corporation; and
2. Adopting an amendment to the ROO that sets forth to what extent, if any, the Commission will regulate SolarCity's provision of solar energy to Arizona schools, governments and non-profit agencies under the specific terms of the SSA at issue in this docket.

II. COMMENTS ON PROPOSED AMENDMENTS.

A. SolarCity is a Public Service Corporation.

The Companies agree with the ROO's analysis and conclusion that SolarCity is a public service corporation. The amendments focus on discrete aspects of the SolarCity's overall activities to identify certain activities that the amendments do not believe should be regulated by the Commission. However, those elements do not eliminate the fact that SolarCity is furnishing electricity to an end user customer through facilities that SolarCity owns, operates and fully controls. The furnishing of the electricity is not "incidental" to SolarCity's operations. First, although the amendments note that SolarCity designs, constructs and finances the solar generation facilities, SolarCity is, in fact, designing, constructing and financing its *own* facilities -- not facilities that will be owned by the schools – and it will be SolarCity that owns, operates, maintains and fully controls those solar facilities, not the schools. This is precisely what other electric utilities do for their generation facilities. Second, if SolarCity could not sell electricity to the schools at a rate less than the incumbent's rate, then there would be no reason to engage in the other activities. The furnishing of electricity is not incidental to SolarCity's operations; it drives those operations.

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Moreover, SolarCity's activities are not limited to schools, governments and non-profits. The record was clear that SolarCity was using SSAs and solar leases for both residential and commercial customers.[3] SolarCity absolutely controls the operation, maintenance, metering of electricity output and billing for electricity provided to those customers. Moreover, once the SolarCity facilities are installed on a customer's premises, that customer becomes a captive customer with little, if any, ability to switch to another on-premises renewable energy provider. And, the arrangement is intended to extend years into the future – it is an ongoing relationship between SolarCity and the customer. Further, the SSA and the solar leases are wholly dependent on incentives that are funded by the public – through surcharges on other utility rate payers. As a result, the provision of electricity by SolarCity renders the "rates, charges and methods of operation a matter of public concern" that are sufficiently "clothed with a public interest to the extent clearly contemplated by law which subjects it to government control." *Gen. Alarm, Inc. v. Underdown*, 76 Ariz. 235, 262 P.2d 671, 675 (1953). Accordingly, there is a real need to, among other things: (i) ensure that SSAs (or solar leases) do not include onerous, usurious or other improper terms; (ii) ensure the continuity of the operation and maintenance of the system; (iii) ensure that SolarCity is accurately determining the amount of electricity produced by the system and properly billing for that electricity; (iv) ensure there is appropriate customer service and consumer protection for the electric service; and (v) ensure there is an efficient and qualified forum for the resolution of customer issues arising from the provision of the electricity. These needs are ongoing and extend beyond the initial installation of the solar system.

The amendments appear to be based on the belief that there are certain aspects of SolarCity's operations that do not require Commission oversight and regulation. However, the Commission can exempt discrete activities even while finding SolarCity to be a public service corporation. Moreover, although the amendments attempt to fully excuse SolarCity by citing to cases where "public service" activities under the Constitution were "incidental" to the primary purpose of the entity, those cases have a clear delineation between the primary purpose of the

[3] Tr. (Rive) at 196; Exs. TEP-2, TEP-3.

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entity and the incidental activity. For example, (1) furnishing water by a mobile home park owner (and including the cost of water service in the rent) was incidental to the operation of the mobile home (*Ariz. Corp. Comm'n v. Nicholson*, 108 Ariz. 317, 497 P.2d 815 (1972)); (2) using the public highways was incidental to operating an armored-car service (*Ariz. Corp. Comm'n v. Continental Security Guards*, 103 Ariz. 410, 443 P.2d 406 (1968)); and (3) transmitting emergency messages by use of wires and electronic equipment was incidental to a business offering home and business property protection (*General Alarm v. Underdown*, 76 Ariz. 235, 262 P.2d 617 (1953)). That clear delineation is not present for SolarCity. Rather, there is a clear nexus between SolarCity's primary business purpose and the furnishing of electricity.

As discussed below, if there are discrete activities of SolarCity that the Commission does not believe need to be regulated, then it can decide that it is not in the public interest to regulate those activities. However, it should not – and cannot – avoid its constitutional and legal obligations by simply deciding that an entity is not a public service corporation for public interest or policy reasons.

B. The Commission need not regulate all activities of a Public Service Corporation.

Even if the Commission finds that SolarCity is a public service corporation, it need not fully regulate every aspect of SolarCity's operations. The Commission could decide that it is not necessary to regulate the specific SSA at issue here as it applies to schools, government and non-profits. Indeed, the proposed amendments appear to attempt to limit the scope of this ruling to the specific SSAs as applied to schools, governments and non-profits. Unfortunately, the amendments do so through a more expansive (and unnecessary) finding that SolarCity is not a public service corporation, rather than exempting a more narrow activity from regulation.[4]

[4] The Commission could decide to rule that regardless of whether SolarCity is a public service corporation, the discrete activity of providing electricity to schools, governments and non-profits under the specific SSA at issue in this docket is not an activity that requires regulation as a matter of public interest and policy.

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Under Arizona law, the fact that a business or enterprise is a public service corporation does not make every service performed subject to regulation as if it were a public service corporation. In those cases, it should be subject only to the same rules as any other private person or entity. *See City of Phoenix v. Kasun*, 54 Ariz. 470, 476, 97 P.2d 210, 213 (1939). A public service corporation may provide services that (1) are not of public concern; and (2) are consequently not subject to Commission regulations. The power of the Commission to regulate public service corporations (*i.e.*, to prescribe just and reasonable rates) depends on whether the "service rendered" is "as essential and integral part of the public service performed"; otherwise, it is a matter of private contract between company and customers. *See Mountain States Telephone and Telegraph Co. v. Ariz. Corp. Comm'n*, 132 Ariz. 109, 115-16, 644 P.2d 263, 269-70 (App. 1982).

By limiting the impact of this order to exempting from regulation the discrete activity at issue, the Commission retains its authority and ability to exercise jurisdiction over – and to regulate as appropriate – SolarCity and other similar entities.

C. The Courts may control future attempts to exercise jurisdiction over entities such as SolarCity.

If the Commission decides that SolarCity is not a public service corporation – even with the proposed narrow scope of the ruling contemplated by the proposed amendments – the Commission may have difficulty asserting jurisdiction over SolarCity or similar entities in the future. The Commission does not necessarily have the authority to assert jurisdiction over SolarCity unless there is a court ruling allowing it to do so.

Unless SolarCity voluntarily submits to the jurisdiction of the Commission in the future, the Commission may need to seek a determination from the courts as to whether SolarCity is a public service corporation. *See Williams v. Arizona Corporation Commission*, 102 Ariz. 382, 383, 430 P.2d 144, 145 (1967); *see also Williams v. State ex rel. Smith*, 2 Ariz. App. 291, 408 P.2d 224 (1965); *Visco v. State ex rel. Pickrell*, 95 Ariz. 154, 388 P.2d 155 (1963). Moreover, depending on the nature and scope of the final order here, the Commission may be estopped from arguing

that SolarCity is a public service corporation. *See Freightways, Inc. v. Arizona Corporation Commission*, 129 Ariz. 245, 630 P.2d 541 (1981). A broad ruling now could certainly inhibit the Commission's regulatory authority and ability in the future.

As a result, the law and the public interest is best served by finding SolarCity to be a public service corporation and then exempting certain discrete activities of SolarCity's activities. Otherwise, the Commission may be harming its ability to protect consumers in the future. By broadly ruling that SolarCity is not a public service corporation, the Commission may be effectively washing its hands of any future regulation of the rooftop solar industry. In doing so, the Commission may, in the future, be unable to adequately protect ratepayers and ensure that the millions of dollars of Commission-mandated incentives are being used appropriately.

III. CONCLUSION.

The Companies support the ROO and request that the Commission adopt it as written. However, if the Commission decides to amend the ROO, it should be careful to limit its order in this docket as narrowly as possible. If the Commission does not want to regulate the use of a particular SSA for schools, governments or nonprofits, the Companies request that the Commission find that SolarCity is a public service corporation but then carefully explain why regulation of the discrete transaction at issue is not in the public interest.

RESPECTFULLY SUBMITTED this 28th day of June 2010.

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